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Competition law rulings in the world of sports – the Market Court's ruling regarding the Swedish Automobile Sports Federation and its decision concerning the Swedish Hockey League

The competition law regime has at EU-level, for a long time, been applied to different sports contracts and agreements. During the 1990's, the so-called Bosman ruling on transfer rights for football players was in focus. Since then, issues such as TV rights to football broadcasts have been tried several times. Questions more closely associated with the practice of sports have also been tried, such as the anti-doping rules for swimmers, in the so-called Meca-Medina case in the mid 2000's. In Sweden, the first competition law case regarding sports contracts and agreements has now been tried. The Market Court has issued a judgement in a case between the Swedish Competition Authority and the Swedish Automobile Sports Federation ("SBF"), case MD 2012:16. The Market Court prohibited SBF, under penalty of a fine of MSEK 1, to apply certain duty of loyalty clauses, which were considered as being anti-competitive agreements. The duty of loyalty-clauses prohibited licensed officials and contestants to participate in motor sport events arranged by other than SBF's member clubs. Notwithstanding the specific nature of the sport, the rules were neither considered as being necessary nor proportionate in order to achieve their legitimate objectives. Furthermore, a decision regarding short-term contracts in the Swedish Hockey League is commented on, where the Market Court in distinction from the Competition Authority considered the rules as being compatible with the competition law provisions. Competition law is thereby entering the world of sports and club activities in Sweden too, and may be said to be here to stay. The rulings in question are hereby commented by Elisabeth Eklund, partner, Ulrika Lundgren, associate and Isabell Nielsen, thesis trainee.

Background to the case

SBF is a non-profit association adopted as a specialized sports federation for motor sports by the Swedish Sports Confederation (Sw: Riksidrottsförbundet). SBF issues regulations and grants permissions to organize certain competitions with the objective to promote and administer motor sports in Sweden. SBF's members consist of almost 500 motor clubs. Officials and participants in competitions arranged by SBF's member clubs must hold a license issued by the SBF.

The common rules of SBF contain duty of loyalty-clauses. These clauses prohibit officials and contestants, licensed by SBF, to participate in motor sports events arranged by other than SBF member clubs, in so far as this is punishable according to

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the SSC's rules on Federal punishment. A violation of the rules may result in fines or a withdrawal of the licence, which inter alia precludes participation in championships.

A SBF member and licensee, who had started a business of his own where he arranged and secured motor sports events, was reported to the SSC, due to his alleged disloyalty. In turn, the member reported SBF to the Competition Authority. After handling this matter, the Competition Authority decided to start an overall investigation regarding the opportunities of licensees to participate in other competitions in addition to the ones arranged by SBF. On 13 May 2012 the Competition Authority ordered SBF, under a penalty of MSEK 1, to alter the rules, which were considered to constitute a restrictive practice on the market for arrangements of motor sports competitions in Sweden. SBF appealed the decision to the Market Court.

The Market Court's judgment

During the exchange of documents before the Market Court, SBF petitioned the Court to request for a preliminary ruling from the Court of Justice of the European Union ("ECJ"), which was disputed by the Competition Authority. The Market Court held, in spite of the fact that there is an obligation for the final instance to obtain a preliminary ruling if any questions concerning the interpretation of EU law exist, that no such obligation was at hand in this case. The reason read that the questions could be determined guided by the principles already developed in case law.

SBF's first objection on the merits was regarding the appealed decision's compatibility with the constitution and the European fundamental right in respect of the freedom of associations. The Market Court held that the decision of the NCA did not restrict the freedom of associations since an illegal practice could not be acquitted from interference on the mere account of being conducted as a cooperative association. In addition, the Market Court clarified that the duty of loyalty in labour law, which is excluded from competition law, was not at hand since the members were not to be regarded as employees.

Initially, the Market Court examined whether there was an agreement between undertakings or an association of undertakings.

The Market Court found that SBF's operation, which partly consists of licensing, did not constitute the exercise of a public authority. If an exercise of a public authority would have been at hand, the association would not have been defined as an undertaking under competition law. With reference to EU case law, the Market Court made the assessment that non-profit associations are able to pursue an economic activity and that it is irrelevant if the incomes are used to cover the costs of the competitions, wholly or in part. In spite of the uncertainty about the average turnover

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in a competition arranged by a SBF member, the Market Court held that the turnover was sufficiently to be qualified as economic activity. Since the members of SBF were considered as being undertakings, SBF was defined as an association of undertakings.

Thereafter the Market Court tried whether it was question of a decision by an association of undertakings. The Court referred to case law according to which the statues of member clubs or of trade associations may constitute a decision of an association of undertakings, if the statues provide the opportunity to control the conduct of the members in the market.

SBF had further argued that there existed no relevant market on which the contested rules were applied. The Market Court found however that the relevant market consisted of the arrangement of motor sports competitions in Sweden. Since the competitions were held throughout Sweden, the internal EU market was affected and Article 101 TFEU, which regulates the prohibitions on anti-competitive practices at EU-level, was directly applicable.

In assessing whether SBF´s contested rules distorted competition, the Market Court found that the mere existence of the rules affected the licensees' incentive to participate in other competitions. As the Swedish Sports Confederation's rules on federal punishment did not limit the prohibition, the loyalty clauses were in fact a total prohibition, which in itself could lead to a restriction of competition. SBF's objection that the rules were not applied, but that permission to participate in other competitions had formlessly been provided for members, was not substantiated. The restriction of competition was considered to be appreciable.

Further, SBF had objected that even if the Market Court was to find that a restrictive practise was at hand, the legitimate objectives and the specific nature of the sport entailed that the competition provisions were not applicable.

The Market Court found indeed that the objections of SBF, purporting to be behind the contested rules, were legitimate. The objections were "providing sports for all", "supporting children and youth activities", "to ensure that competitions can be organized under similar and fair forms" and "to ensure that motor sports competitions are held in a secure manner." The Court held that the objectives "providing sports for all" and "supporting children and youth activities" were not met by the contested rules of SBF. The other alleged purposes were considered to be met by the SBF´s rules. However, the investigation of the case did not support that the wording of the rules was necessary to achieve the objectives.

Thus, the Market Court held that even if the objectives were to be regarded as legitimate, an examination of whether the rules were considered as necessary and

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proportionate to meet the objectives was required. The Market Court stated that even if the rules had a legitimate objective, a total prohibition was too far-reaching. The legitimate objectives could therefore not justify the anti-competitive rules.

Nor was the Market Court of the opinion that the SBF's rules could be justified by virtue of the exemptions in Chapter 2, Section 2 of the Competition Act and Article 101.3 TFEU. The rules could neither be excluded from the competition law regime with the support of the rule of contracts between employers and employees in Chapter 1, Section 2 of the Competition Act. As the Market Court is the final instance, the judgment is not subject to appeal.

The Competition Authority's decision concerning the Swedish Hockey League
The Board of the Hockey League decided in August 2012 that "earlier decisions to only contract players for a whole season stand firm, which means that short-term contracts with NHL players at a possible lockout will not come into question."

The NCA issued 20 September 2012 a preliminary injunction under penalty of a fine of MSEK 20 where the Swedish Hockey League was prohibited from preventing its member clubs to sign short-term contracts with hockey players from the NHL. The decision was appealed to the Market Court, which in decision on 18 December 2012 (case A 2/12) revoked the Competition Authority's preliminary injunction. However, the Market Court stated that the competition law rules were applicable to the Hockey League and the decision in question. Thus, the decision was not to be regarded as an agreement under labour law which shall be exempted from a competition law review.

The Hockey League had stated that the rule on short-term contracts was added in light of the legitimate interests of safeguarding the fairness and proper conduct of the competition and to avoid the sporting imbalance that can occur when a team's skill level and effectiveness vary during the season. The Market Court found that the rule promoted this interest. The rule's objective was therefore considered as legitimate. In addition, the rule on short-term contracts was considered to be a necessary consequence of this objective and was also regarded as proportionate. Thus, the Hockey League's rule on short-term contracts was considered compatible with competition law. A judge, however, issued a dissenting opinion and held that the preliminary injunction should have been upheld.

The NHL-lockout was hereafter terminated. Games in the NHL started 19 January 2013. The hockey players who were previously locked out from the NHL were no longer available for play in the Swedish Hockey Super League (Sw: Elitserien) why the Competition Authority no longer found reasons to continue the investigation whether a possible infringement of the competition rules had occurred. Hence, the NCA closed its investigation.

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Concluding remarks

The Market Court's judgment as well as the Competition Authority's decision have received much attention in the media where primarily the Swedish Sports Confederation strongly disputed that competition law could be applied. The Market Court's ruling show, as was already established at the EU level, that no sector is free from competition law review. As in other sectors, the competition law rules cover both large companies and those with more limited turnovers. This case will certainly be followed by several other cases where the conduct of sports clubs will be challenged from a competition law perspective. We hope, however, that the Swedish Courts in the future will be better at requesting preliminary rulings from the ECJ, when questions concerning the interpretation of EU law arise.

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